Office - Supreme Court, U.S.
FILED
AUG 11 1982
ALEXANDER L. STEVAS,
CLERK

Docket No. 82-56

# In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

V.

SEA-LAND SERVICES, INC.,
Respondent.

## RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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See Inside Covers For Cases Continued

MELVIN BANDY, For and on behalf of himself, individually, and
AMERICAN MUTUAL INSURANCE COMPANY of BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, For and on behalf of himself, individually and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

WALLACE CURRY, and
ATLANTIC AND GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, For and on behalf of himself, individually,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

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DOCKET NO. 82-56

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellenic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport, Inc.,
Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

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ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

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## RESPONDENT'S BRIEF IN RESPONSE

Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the Fourth Circuit's decision in this case. The opinion below is reported at 676 F.2d 106 (4th Cir. 1982) and is reproduced at Petition (Appendix) p. 35 et seq.

## STATEMENT OF THE NATURE OF THE CASES

Each of the consolidated cases involves a plaintiff longshoreman who was injured on the job and received compensation benefits from his employer or the employer's insurance carrier pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. hereinafter referred to as the "Act." Each later brought an action against a third party vessel owner (the respondents) as permitted by §905(b). In each case the district court granted summary judgment pursuant to the provisions of §933(b) because suit was filed more than six months after an award of compensation.

Four of the cases (Bandy, Caldwell, Harold, and Curry) were originally dismissed in the district court pursuant to Bandy v. Bank Line, Inc., 442 F.Supp. 882 (E.D. Va. 1977). An appeal was taken to the Fourth Circuit Court of Appeals resulting in Caldwell v. Ogden Sea Transport, 618 F.2d 1037 (4th Cir. 1980). The summary judgments were reversed and the cases remanded to the district court.

Further proceedings[1] were stayed pending this Court's decision in Rodriguez v. Compass Shipping Co., ultimately decided on May 18, 1981 at 451 U.S. 596. Caldwell, was overruled by Rodriguez, and all four defendants then refiled motions for summary judgment. The district court issued a written decision in the Bandy case styled Bandy v. Bank Line, Ltd., 518 F.Supp. 1229 (E.D. Va. 1981), hereinafter referred to as Bandy II. Appeals were again filed to the Fourth Circuit Court of Appeals.

Meanwhile, the other three claimants who have petitioned this Court for certiorari (Simmons, Spratley and McLean) had filed suits and the defendants had filed motions for summary judgment. Citing Bandy II these motions were granted and appeals filed to the Fourth Circuit.

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1 Pursuant to Caldwell, employers/compensation carriers were added as involuntary plaintiffs. No appearance was ever made by any of these parties, and their participation was mooted by Rodriguez.

The Fourth Circuit consolidated these seven cases[2] for briefing and oral argument. An opinion was rendered on April 12, 1982, Simmons v. Sea-Land Services, Inc., 676 F.2d 106 (4th Cir. 1982) and it is from this decision that the petitioners appeal.

In each of these cases the plaintiff began receiving compensation benefits under the Act shortly after his injury, and compensation benefits ceased more than six (6) months before suit was filed.

BANDY:

Melvin Bandy was allegedly injured on January 29, 1976. He received temporary total compensation benefits for the period January 30, 1976 until March 21, 1976. Bandy returned to work without any dispute as to further temporary benefits, and no claim was filed for permanent disability.

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[2] One other case that was part of the Fourth Circuit consolidation — Hart v. D. B. Denis Nakliyati T.A.S., Record No. 81-1815 — has not been appealed to this Court. Thus there were eight cases before the Fourth Circuit.

A suit for damages was filed in September, 1977.

In June, 1981, Bandy's attorney filed an affidavit reciting a reassignment to Bandy from American Mutual, the employer's carrier.

SIMMONS:

Pearlie Simmons allegedly was injured on July 5, 1979. His employer Nacirema began paying compensation benefits on a voluntary basis beginning July 6, 1979. Nacirema so advised the Department of Labor by filing an appropriate form and a copy was sent to Simmons. Payments terminated on February 3, 1980, when he returned to work. As a result of this work resumption, the employer filed an LS-208 styled "Compensation Payment Stopped or Suspended," a copy of which the Department of Labor is required to send the employee.

Simmons stopped working around the end of March, 1980, claiming further disability and Nacirema again commenced voluntary compensation payments which are continuing.

Suit was filed on October 28, 1980.

SPRATLEY:

Following plaintiff's accident of July 19, 1978, the plaintiff's employer, Atlantic & Gulf Stevedores, Inc., notified the Department of Labor of plaintiff's injury and began to pay temporary total benefits which terminated on October 20, 1978.

Thereafter, an informal conference was held at the Deputy Commissioner's Office on January 18, 1979, wherein it was recommended that the employer pay additional temporary total disability compensation commencing January 18, 1979, and a memorandum of informal conference was filed on that date. Compensation was duly paid following this conference. A second informal conference was conducted on May 9, 1979.

Later, the employer contested payment of permanent disability benefits to plaintiff and a formal hearing was held before an administrative law judge, who issued an order dated October 30, 1979, requiring payments of compensation for permanent disability.

Spratley filed two suits in the Circuit Court of Norfolk the first of which was voluntarily non-suited by

plaintff,[3] who had neither served or requested the issuance of any process. The second state court action was filed on February 5, 1980, and was also voluntarily non-suited by the plaintiff, on or about the time this federal court action was filed on October 17, 1980.

MCLEAN:

McLean was injured on or about March 4, 1976, while employed by Atlantic & Gulf Stevedores, Inc. Compensation forms and reports were filed with the Department of Labor shortly after the accident showing that compensation was being paid voluntarily. McLean returned to work for short periods of time during the years 1976 through 1979 and each time he returned to work Atlantic & Gulf filed a form showing that payments had been terminated. The first of these forms was filed with the Deputy Commissioner on June 18, 1976, showing that the last payment of compensation

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[3] The footnote in the Simmons decision at p. 109 obviously refers to this earlier suit Spratley filed in state court which he voluntarily dismissed. The petition does not address the auxiliary issue that would necessarily have to be faced if Spratley's position is accepted, viz the meaning of "commence an action" in §33(b).

was made on May 25, 1976. Suit against the shipowner was filed on January 25, 1979. After receiving temporary total disability payments for several years, McLean claimed permanent total disability and a formal hearing was held before an administrative law judge who issued an order which was filed on November 19, 1979.

HAROLD:

Harold was injured on November 1, 1976, while employed by Quinn Marine Services, Inc. He received temporary total compensation from his employer through its compensation carrier, The Hartford Accident and Indemnity Company until January 5, 1977. Suit was filed on July 22, 1977, more than six months after the last payment of compensation.

On October 5, 1981, The Hartford filed an action in the United States District Court for the Eastern District of Virginia seeking to recover damages pursuant to §933(d) and (e). That case is still pending.

CALDWELL:

Plaintiff was injured on May 7, 1976, while employed by Rogers Terminal. Plaintiff received workman's compensation benefits paid voluntarily by the carrier and forms showing the commencement of these payments were filed with the Department of Labor. Compensation was paid until July 11, 1976 and when benefits were terminated a form LS-208 was filed with the Department of Labor.

Suit was filed in May, 1977, more than six months after compensation terminated.

CURRY:

Plaintiff was injured on Janury 30, 1975, while working as a longshoreman for Atlantic & Gulf Stevedores. He immediately began receiving voluntary compensation benefits from his employer. Suit was filed in October, 1977, more than six months after the last payment of compensation in November, 1976.

## ARGUMENT

**POINT I: NO CONFLICT EXISTS BETWEEN THE HOLDINGS OF THE SECOND AND FOURTH CIRCUITS NECESSITATING A REVIEW OF WHAT CONSTITUTES AN ADMINISTRATIVE AWARD.**

For the third time in as many years, this Court is asked to interpret §33 of the Longshoremen's Act (33 U.S.C. §933).[4] See Bloomer v. Liberty Mutual Insurance Co., 455 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980) and Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981). In Rodriguez, the Supreme Court affirmed the dismissal of actions by longshoremen who failed to institute third-party actions within six months of an award of compensation. The Court stated, 101 S.Ct. at

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[4] Congress has been holding hearings with regard to the possible amendment of many provisions of the Longshoremen's and Harbor Workers' Compensation Act including §33(b) and proposed bills have been introduced in both the Senate and the House of Representatives. S. 1182 (introduced by Senators Nickles and Nunn on May 14, 1982); H.R.25 (introduced by Congressmen Erlenborn). S. 1182 was passed by the Senate on July 27, 1982 and is presently pending before the House of Representatives.

1955: "Congress unequivocably made the choice in favor of first giving the employee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter . . ."

The longshoremen here likewise had their actions dismissed for failure to file suit within the required six month period, resulting in assignment as a matter of law to their employers.[5] They seek to escape Rodriguez by contesting that any awards were made more than six months prior to suits being filed. In Rodriguez, no formal orders were entered, the lower courts holding that settlement agreements reached after official informal conferences were equivalent to formal orders for purposes of §33(b), thus triggering the six month

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[5] Indeed, in at least one of these cases (Harold) the employer's compensation carrier, The Hartford Accident and Indemnity Insurance Company, has exercised its right of assignment and has filed suit against the shipowner. The district court in that action held that the insurer's action was not time-barred under the doctrine of Laches. The Hartford Accident and Indemnity Insurance Co., C/A No. 81-1013-N (E.D. Va. 1981). No doubt other such suits will follow if certiorari is denied by this Court.

period in which to file suit. This Court stated at footnote 3 in Rodriguez "[a]ccordingly, for purposes of our decision, we assume that their acceptance of compensation operated as an assignment under §33(b)." Thus, the Court did not need to review that issue.

The longshoremen seeking review in this Court allege a conflict between the Fourth Circuit and the Second Circuit on the award question and additionally assert that this is an important question of federal law which should be decided by this Court. The respondents' reply is that there is no real conflict in the holdings of the Fourth and Second Circuits and that the difference in approach by the two circuits does not present a significant question that needs to be settled by the Court at this time.

Simmons is simply a refinement of the Fourth Circuit's earlier case of Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977). There, the court held that the Act did not require a "formal" order for there to be "an award in a compensation order," but that certain administrative actions constituted an informal award so as to trigger the six month period of

time which the longshoreman had to file suit prior to his action being assigned to his employer. The court held that the voluntary payment of compensation together with the filing of the various required forms with the Deputy Commissioner (including notification that payments were stopped) together with the acceptance of the compensation, constituted an "award" with the meaning of §933(b). The court held, 564 F.2d at 1102, that ". . . some act, or some order, whether formal or informal, must occur in order for there to be a compensation award." The court then held, 564 F.2d at 1103, that the filing and acceptance by the Deputy Commissioner of the required documents:

> ". . . constituted sufficient affirmative action and a determination by the deputy commissioner granting benefits to Melson so as to constitute an 'award' of benefits in a compensation order under 33 U.S.C. §933(b) without the entry of a formal award. Melson's rights against the third parties were assigned by operation of law to his employer, the stevedoring co., 33 U.S.C. §933(b), and thereafter subrogated by operation of law to the insurance carrier. 33 U.S.C. §933(h).
>
> We believe this result is a logical one. A stevedore-employer should not be required to controvert every claim for

> compensation under the Act simply to insure the entry of a formal award in order to preserve the statutory assignment and subrogation rights of the stevedore-employer and insurance carrier under 33 U.S.C. §§933(b) and (h). Such a requirement would frustrate the Act's time-honored purpose which was to eliminate the delay and expense incident to litigation . . . and cripple the congressionally explicit goal of prompt payment of claims that need not be controverted by employers. 33 U.S.C. §914; 29 C.F.R. §702.231."

Petitioners have cited no cases, at least since the 1959 Amendments, which hold that a formal adjudication of the right of the parties was necessary in order to constitute an award.

Even in the cases cited by plaintiffs the courts have uniformily held that a formal order is not required. Rather these cases emphasize that an award does occur during the informal compensation process before the Deputy Commissioner. The only difference with the present cases being at what point in the informal process the compensation award occurs. See, for example, Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Pa. 1980); Sea Quest Marine, Inc. v. Cove Shipping, Inc., 474 F.Supp. 164 (W.D. Wash. 1979);

Rodriguez v. Compass Shipping Co., Ltd., 456 F.Supp 1014 (S.D.N.Y. 1978).

It is submitted that the Fourth Circuit's interpretation of §33 in Liberty Mutual is fully supported by the Act and the implementing regulations. Section 14 of the Act (33 U.S.C. §914) requires that compensation be paid promptly to persons entitled thereto except when liability is controverted, and §§14(a) and (i) authorize the Deputy Commissioner to conduct investigations, cause medical examinations to be conducted, require deposits, and take such steps as may be required to properly protect the rights of the parties. Additionally, certain regulations have been promulgated to deal with non-controverted claims and the providing of medical care. See 29 C.F.R. §§702.231 - 702.236 and 29 C.F.R. §§702.401 - 702.422. Under these regulations, the employer is required to notify the Deputy Commissioner when the first installment of compensation is paid (29 C.F.R. §702.234), a report of personal injury must be made within ten days of the injury (29 C.F.R. §702.201), and the Deputy Commissioner is required to "actively supervise the medical care of an

injured employee covered by the Act." (29 C.F.R. §702.407). Thus, it is apparent that once the required reports have been filed, the Deputy Commissioner is taking affirmative action with regard to the claim such that an "award" should be deemed to have occurred.

The Second Circuit explained in its Rodriguez decision, 617 F.2d 955, 959, why there was no longer any reason to apply an overly strict interpretation of the award question under §33(b) as did such earlier cases as Toomey v. Waterman S.S. Corp., 123 F.2d 718, 721 (2d Cir. 1941); Grasso v. Lorentzen, 149 F.2d 127, 129 (2d Cir.) cert. denied, 326 U.S. 743, 66 S.Ct. 57, 90 L.Ed 444 (1945); Sessa v. Weeks Stevedoring Co., 56 F.Supp. 50 (S.D.N.Y. 1943). The Court stated, 617 F.2d at 959:

> "These decisions, however, represented an effort to relieve claimants from the harshness of the Act as it existed prior to the 1959 Amendments which govern the present case.
>
> Prior to 1959, the right to sue third parties was assigned to the employer as soon as settlement was reached. This forced an injured employee to elect at once between immediate compensation and delays and uncertainties of litigation at a time when he had cash flow problems. Many courts therefore invoked

every available technicality to avoid finding an assignment.

> Congress in 1959 amended §33(b) to permit the employee to receive a statutory compensation award which would not operate as an assignment unless he failed to sue within six months. S. Rep. No. 428, 86th Cong., 1st Sess., reprinted in 1959 U.S. Cong. & Admin. News, pp. 2134-35. With the elimination of the harshness that prompted Grasso and Sessa, the Act as it stood at the time of the events here should be construed 'from the realities of the situation rather than by the labels employed,' Sabol v. Merritt Chapman & Scott Corp., 241 F.2d 765, 767 (2d Cir. 1957)."

The longshoremen herein base their petition on an asserted conflict with Verderame v. Torm Lines, 670 F.2d 5 (2d Cir. 1982).[6] Yet, Verderame like Rodriguez, 617 F.2d 955 (2d Cir. 1980), holds, as does the Fourth Circuit, that an informal award of compensation is all that is required to start the running of the six months period for the longshoremen to file suit before an assignment occurs. The standard established by the Second Circuit is explained in Verderame, supra, at 7:

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[6] They also assert a conflict with D'Amico v. Cia De Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982), but the court merely remanded that case to the district court for the development of further evidence on the question of whether or not there was an award and therefore the case cannot be said to be in conflict with Simmons in its present posture.

> "For these reasons we hold that until the amount of compensation benefits to be received by the injured longshoreman is fixed, either by order, stipulation of the parties, or informal award, there cannot be an '[a]cceptance of compensation under an award in a compensation order' within the meaning of §33(b) of the Act." (Emphasis Supplied.)

Further, petitioners have severely criticized Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977) upon which Simmons was based. However, the Second Circuit,[7] rather than being in conflict with the Fourth Circuit, approves Liberty Mutual. The court in Verderame, supra, at 7, states:

> "Similarly, in Liberty Mut. Ins. Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), relied upon by Torm, although there was no entry of a formal award, not only had the total amount of the compensation benefits payable by the insurer been agreed upon and paid, but compensation had been 'terminated' before an action against the shipowner (in that case by the employer) was commenced."

Thus, the Second Circuit adopts the principle of Liberty Mutual that if the compensation payments have terminated and six months thereafter expires before suit is filed, then the longshoremen will be barred.

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[7] Simmons had not been decided at the time of the Verderame decision.

The present cases fall squarely within the holding of Liberty Mutual and the Second Circuit's Verderame ruling — all being "last payment" cases. The amount of compensation is "fixed" when a longshoreman, as here, accepts what he believes to be his last compensation payment. Thus there is no real conflict in view of the facts in Liberty Mutual/Simmons and Verderame.

In each of the seven cases herein, compensation had been paid and terminated without controversion and appropriate forms filed with the Deputy Commissioner indicating that compensation had been stopped. In none of these cases was suit filed within six months of the initial termination of the payments. In four of these cases (Bandy, Curry, Caldwell and Harold) payments were never reinstituted after the initial termination and the six months period expired before any suits were filed. Thus, these four cases fall squarely within the Second Circuit's rule and cannot possibly be considered in conflict. In the other three cases (Simmons, McLean

and Spratley[8]), payments were terminated without controversion and the appropriate forms filed and thereafter six months expired before suits were filed. However, in these cases for one reason or another, the payments were later resumed — a "stop-start" situation.

Thus, it is by no means clear that even in these three cases that there would not be informal awards under the Second Circuit's rule. Once compensation terminates, the six months period begins to run, and later changes in the medical condition of the longshoremen should not alter this fact. Otherwise, there would be confusion between the longshoremen and their employers as to who had the right to file a suit to recover damages and recoup the compensation benefits.[9] Therefore, it is seen that the holding in the

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[8] Spratley's present federal court case was also filed more than six months after a formal award. Shipowner produced persuasive law that an earlier state court suit voluntarily non-suited by longshoreman did not toll the six month statute, but the Fourth Circuit in view of its broad ruling, did not address this issue.

[9] Dating the award from a formal order would not allieviate this situation. There can always be subsequent orders. See §22 of the Act (33 U.S.C. §922).

cases of four petitioners present no conflict at all with Second Circuit. The other three apparently present no conflict, and are at best not in a posture to determine whether or not there would be any conflict.

The Fourth Circuit in these cases could easily have affirmed the district court's dismissal based on the principle of the last payment of compensation having been made. The Fourth Circuit in enuniciating its first payment rule, was drawing a bright line for parties in future cases to know exactly when the informal award has been made; however, the Fourth Circuit's statement was overly broad as far as the actual facts in these seven cases and was therefore unnecessary to its decision. Thus, while there may be a divergence of opinion between the Second Circuit's rule, which would allow a "first payment" case to proceed but not a "last payment" one and the rule set out by the Fourth Circuit's in Simmons, there is no conflict between the actual holding in Simmons as it affects the cases under consideration. Simply, none of these cases involved a pure first payment dismissal, and it would appear that

even under the rule of the Second Circuit an assignment has occurred in each of these cases.

Rodriguez was decided only one year ago. Two circuits are now cited to this Court as having issued opinions based on Rodriguez and having expressed views on what constitutes an informal award of compensation in order to trigger the six months' running of the statute under §33(b). These cases, Verderame and Simmons, are more in agreement than disagreement. Certainly there is no disagreement between the principle established in Verderame and its application to the actual facts of the cases involving four of the petitioners herein and it is doubtful if there would be any difference as to the other three. This Court should exercise its discretion and allow the rule on this relatively narrow issue to be fully developed in the various circuits before deciding if it again is necessary to step in so soon and clarify §33 of the Act. "The Court may prefer to defer [the] issue until it can have the benefit of consideration by several lower courts, or until cumulating events provide a better perspective for decision." Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction §4004 (1977).

POINT II: THERE IS NO CONFLICT IN THE CIRCUITS AS TO REASSIGNMENT.

Petitioners contend that there is a conflict within the Fourth Circuit, and that Simmons conflicts with Third Circuit cases.

As far as the Fourth Circuit conflict is concerned, it should have been solved by a petition for rehearing en banc addressed to the Fourth Circuit. See North Carolina Utilities Commission v. F.C.C., 552 F.2d 1036, 1044-45 and n.8 (4th Cir. 1977). Furthermore, this is not the type of "conflict" envisioned by Rule 19 of the Supreme Court Rules.

The Third Circuit cases cited pre-date the 1959 Amendments to the Act, and this Court's Rodriguez decision.[10] Moreover, two of these cases Johnson v. Sword Line, 146 F.Supp. 940 (E.D. Pa. 1956) aff'd 257 F.2d 541 (3rd Cir. 1958) and Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950), do not deal with voluntary reassignment. They deal with the very issue this Court

[10] Voluntary reassignment was not reviewed in Rodriguez.

did address in Rodriguez – the status of employees' rights after an assignment – and these Third Circuit cases as well as Caldwell, supra, were overruled.

Only one other circuit court case discusses voluntary reassignment. Del Re v. Prudential Lines, Inc., 669 F.2d 93 (2d Cir. 1982), petition for cert. filed, 50 U.S.L.W. 3998.20 (No. 81-2315). There the injured worker filed suit more than six months after he was "awarded" compensation and the defendant moved to dismiss on this ground. Del Re responded by obtaining a letter from his employer's compensation carrier which "ratified" the commencement of Del Re's action in his own name. The issue was whether this purported reassignment was valid. The district court found it was pursuant to Rule 17(a), F.R.C.P., on the ground that the carrier was the real party in interest.

The Second Circuit disagreed and reversed stating, "To give effect to such a 'ratification' would defeat the purposes of the Act as amended in 1959 and 1972." Del Re at 97. It was held that after the time

period of §33(b) had expired, Rodriguez required that the employer, and only the employer, could sue the third party.

The Fourth Circuit reached the same conclusion and the same result in the cases under consideration.

Here two of the assignees purportedly reassigned their rights back to the employee. In Bandy the employer's compensation carrier wrote a letter on June 5, 1981, reflecting a decision "to assign (the plaintiff), the right to proceed with this third-party action." Bandy II (53A). In Caldwell the employer's compensation carrier executed an "assignment" which is essentially an affidavit purporting to transfer its lien[11] rights to Charles Caldwell.

In view of this Court's holding in Rodriguez, supra, at 101 S.Ct. 1955 that there was neither a substantive nor procedural right for involuntary reassignment as was discerned in Caldwell, supra, the district court below refused to sanction this "end run"

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[11] A true assignment (or reassignment) would transfer all the employers' right of action, not just its lien rights. See 33 U.S.C. §933(d).

around the statutory scheme (60A-61A). The Fourth Circuit agreed that Rodriguez compelled it to overrule its earlier Caldwell decision on this point (43A-45A).

Thus, we are left with two - and only two - circuit courts of appeals decisions after Rodriguez and both hold that voluntary or express reassignment is not permitted.

## CONCLUSION

This Court should not grant Certiorari because there is no conflict in the circuits on the issues involved, and no substantial question of federal law has been raised.

Respectfully submitted,

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## STATEMENT REQUIRED BY RULE 28.1

1. Respondent, Sea-Land Service, Inc., is a subsidiary of R. J. Reynolds Industries, Inc.

2. Respondent, Bank Line, Ltd., is a corporation organized under the laws of Great Britian and is not a subsidiary, affiliate or parent of any other corporation.

3. Respondent, Hellenic Lines, is a corporation organized under the laws of Greece and is not a subsidiary or parent of any other corporation. Universal Cargo Carriers Corp. and Transpacific Carriers Corp., which are Panamanian corporations, are affiliates of Hellenic Lines.

4. Respondent, Ogden Sea Transport, Inc., is a subsidiary of Ogden Marine, Inc.; Ogden Marine, Inc. is a subsidiary of Ogden Corp.

5. Respondent, Compania Crasatlantica Espanola S.A., is a corporation organized under the laws of Spain and is not a subsidiary, affiliate or parent of any other corporation.

6. Respondent, Companhia De Navegacao Maritima Netumar, is a corporation organized under the laws of Brazil and is not a subsidiary, affiliate or parent of any other corporation.

7. Respondent, Cia Transatlantic Espanola S.A., is a corporatioin organized under the laws of Spain and is not a subsidiary, affiliate or parent of any other corporation.

## CERTIFICATE OF SERVICE

I, John B. King, Jr., certify that on August 11th, 1982, forty (40) copies of this BRIEF IN OPPOSITION were mailed or delivered to the Clerk, United States Supreme Court and three (3) copies were mailed to:

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